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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

AMEN WARDY, Plaintiff and Appellant, v. ANTHONY MATIJEVICH, Individually and as Trustee, et al., Defendants and Respondents.	G045745 (Super. Ct. No. 30-2009-00317932) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David R. Chaffee, Judge. Affirmed.

Law Offices of Joshua B. Vinograd and Joshua B. Vinograd; Payne & Fears and Erik M. Andersen for Plaintiff and Appellant Amen Wardy.

Rutan & Tucker and Milford W. Dahl, Jr., for Defendant and Respondent Anthony Matijevich.

Hatton, Petrie & Stackler and Arthur R. Petrie, II for Defendant and Respondent Irvine Terrace Community Association.

Amen Wardy (Wardy) appeals from a judgment after the trial court entered judgment in favor of Irvine Terrace Community Association (the Association) and Anthony Matijevich (Matijevich), individually and as trustee of his family trust (hereafter collectively Matijevich). Wardy argues: (1) the trial court erred in ruling Wardy's cause of action against Matijevich for breach of restrictive covenants was barred by the five-year statute of limitations; and (2) the court erred in ruling the Association waived a restriction concerning how far a property owner could build onto the bluff and the Association's methodology for determining the build-to line was not protected by the judicial deference rule/business judgment rule. None of his contentions have merit, and we affirm the judgment.

FACTS

The Association's declaration of conditions, covenants, and restrictions (CC&Rs) was recorded in 1971. The CC&Rs require the Association to enforce all restrictions, including Article IX, section 9, which provides, "No building or other structure shall be constructed on those portions of lots 1 to 10 inclusive of Tract No. 5130, described in EXHIBIT "A" attached hereto and made a part hereof." Exhibit A details setback requirements for 10 lots, including Lot 10 (Wardy's lot) and Lot 9 (Matijevich's lot), that sit atop a bluff overlooking Newport Harbor.

Article VI, section 1 provides: "No building . . . or other structure shall hereafter be commenced or erected upon the properties subject to this Declaration, nor shall any exterior addition to or change or alteration therein . . . hereafter be made until the plans and specifications showing the nature, kind, shape, height, materials and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the Architectural Committee . . . ."

Article X, section 4, states: "The provisions of the Declaration shall be liberally construed to effectuate its purpose of creating a uniform plan for the

development of a residential community or tract and for the maintenance of the properties and the common recreational facilities and common areas."

The Association also adopted Architectural Guidelines (the Guidelines). The Guidelines require all members to submit completed working drawings for construction of any part of a home to the Architectural Review Committee (the Committee) for review. (The Guidelines, §§ 3.1, 5.1.) Section 1.3 of the Guidelines provides: "In evaluating the member's submittal, the . . . Committee shall base its judgment on the following criteria: [¶] (a) Character of the structure or landscape with respect to its harmony of exterior design and location in relation to surrounding structures and topography of . . . [the] Association as a whole. [¶] (b) The . . . Guidelines. [¶] (c) Relevant deeds, regulations, [CC&Rs] of record." The Guidelines include appeal procedures to the Committee and the Association Board of Directors (the Board). (The Guidelines, §§ 6.0, 7.0.)

Section 13 of the Guidelines governs lots on ocean bluffs. Section 13.1 states, "On bluff lots, no vertical supports or posts to support roofing or shade structure will be permitted within the 10 foot (10'0") rear yard setback." Additionally, section 11.1 provides: "No walls, fences or other structures shall be built higher than 6 feet (6'0"). However, for any bluff lots, any wall, fence, or other structure constructed within the 10 foot (10'0") setback on such bluff lots, shall not exceed 3 feet (3'0") in the 10 foot (10'0") bluff setback. The setback area is defined as measured from the top of slope per the original grading plans of the subdivision."

Matijevich owns Lot 9, at 1107 Dolphin Terrace, Corona Del Mar, located within the Association. Next door to Matijevich is Lot 10, at 1111 Dolphin Terrace, Corona Del Mar, also located within the Association. In 2004, Russell Jay owned this property.

In March 2004, Zachary Sham, the Association's architect, sent Matijevich a letter. In the letter, Sham explained he received Matijevich's building plans. The letter

detailed 17 issues Matijevich had to address before the Association would approve the plans. No. 1 on the list was, "Neighbor awareness must be received in writing from both adjacent neighbors." No. 2 on the list was, "No new construction shall block the view of either adjacent neighbor house."

On April 5, 2004, Bill Livingston sent David Bray an e-mail explaining he had received a frantic telephone call from Jay. Jay was upset because Matijevich planned to demolish his house and rebuild a new house that extended 15 feet further than the current residence. Jay was concerned because the new structure would block his view. Livingston asked if Matijevich notified the Association and whether the Committee would be meeting with them. Livingston stated he and Jay wanted to attend any meetings with the Committee.

On September 8, 2004, Sham sent Matijevich another letter. Sham stated he received a set of building plans approved by the City of Newport Beach (the City). Sham explained there were seven items that had to be addressed, including Matijevich must obtain written consent from his adjacent neighbors.

There was evidence that two days later Matijevich sent the resident at 1111 Dolphin Terrace, Jay, a letter that stated: "My wife . . . and I are your neighbors located at 1107 Dolphin Terrace. After almost two years of design, planning and obtaining of permits, we have finally demolished the old structure and scrapped the lot. [¶] You may recall that we spoke about the design of the new house several months ago when the Association was conducting their design review. . . . [T]he Association's architectural review representative, . . . Sham and Associates, has requested you be notified in writing of the pending construction. Additionally, they have requested that you acknowledge in writing your awareness of the construction, as soon as possible." The letter concludes by requesting Jay to sign the letter acknowledging receipt and return it in the enclosed pre-paid envelope.

The Association approved Matijevich's building plans on September 15, 2004. Since 2000, the Association has approved construction of three homes in violation of Exhibit A's rear building restrictions—those built by Charles Bogner, Paul Lunsford, and Matijevich.

On September 16, 2004, Sham sent Matijevich another letter. With regard to written consent from Matijevich's adjacent neighbors, Sham wrote: "On 9/13/04, the Matijevich's delivered letters to their neighbors, at 1101 and 1111 Dolphin, and stamped envelopes. These letters are designed to be mailed to our office but have not been received as of 9/16/04."

Over four years later, Wardy purchased from Jay Lot 10 and its original residence. Wardy intended to tear down the original, dilapidated home and build a new home and sell it. On January 29, 2009, Wardy contacted the Committee about the build-to line for his property. Escrow closed the next day. The following day, Wardy and the Committee had their first pre-planning meeting about the build-to line for his property. At their second meeting on February 17, 2009, the Committee asked Wardy to obtain the plans for the two adjacent properties to determine the build-to line.

On March 17, 2009, the Committee met to determine a build-to line that would be fair to all parties. On March 21, 2009, the Committee established a build-to line of 130 feet. As they had with the other three homes, the Committee went to Wardy's property and based on topography and harmony with existing homes, the Committee made a visual determination where the bluff stopped. The Committee then measured 10 feet back from that determination.

On March 24, 2009, Sham sent the Association's property management company his recommendation. In the letter, Sham explained the Committee met to review the site conditions for 1111 Dolphin Terrace, Wardy's property, and determine the lot's original top of bluff. Sham explained, "In assessing the conditions of the adjacent homes at 1107 Dolphin and 1119 Dolphin, the Committee felt that the proposed residence

should not encroach past the view planes of either residence at the side yard setbacks." Sham thus concluded the maximum allowable location of the ground floor and the basement would be 130 feet from the front property line to the rear of the structure. The following week, the Association notified Wardy of its findings.

On April 2, 2009, Wardy's architect responded in writing to the Association's manager. The letter stated Wardy objected to the proposed maximum build-to line and requested an appeal because the Committee was holding Wardy to a standard inconsistent with development. The letter added: "It appears that due to the fact that there is not a clearly identifiable 'top of bluff' on the Wardy's property the [C]ommittee set out to establish the maximum allowable 'build to' line for the Wardy's property based on neighbors 'view planes.' The Wardy's and I are not familiar with any view protection rights along Dolphin Terrace based on view planes. If, however, there are 'view plane' protection rights it is also not clear why the rights of the Wardy property were not protected when adjacent properties were granted approvals to extend their houses towards the southwest." Wardy requested he be able to build "to a line consistent with the existing pattern of development."

On April 4, 2009, the Committee met with Wardy to discuss the build-to line and informed Wardy he could appeal to the Board. Wardy appealed and the Board denied his appeal. Wardy and the Association participated in the Davis-Stirling Act's alternative dispute resolution process (Civ. Code, § 1369.510 et seq.), to no avail.

Trial Court Proceedings

On November 5, 2009, Wardy filed a complaint alleging the following: (1) breach of restrictive covenants against the Association and Matijevich[1]; (2) breach of fiduciary duties against the Association; (3) negligence against the Association;

[1] The complaint also named Lunsford and Bogner. Before trial, Wardy settled with and dismissed them, and they are not parties in this appeal.

(4) declaratory relief against the Association and Matijevich; and (5) mandatory injunctive relief against the Association and Matijevich. Matijevich and the Association answered. The Association moved for a site inspection, and Wardy requested any inspection be delayed until after he rested his case.

Before trial the parties filed a joint statement of stipulated facts, including the following: The Association owes a fiduciary duty to all Association members and has a duty to enforce the CC&Rs. Every owner of real property in the Association is bound by the CC&Rs, and has the right to enforce the CC&Rs. The Association approved Matijevich's building plans on September 15, 2004. Matijevich's, Bogner's, and Lunsford's homes all encroach past the rear building envelope set forth in Exhibit A of the CC&Rs. Wardy and the Association participated in the CC&Rs internal dispute resolution process and the David-Stirling Act's mandatory dispute resolution process. The parties also filed a joint statement of controverted issues.

Trial

Wardy offered the testimony of an adverse witness, the Association's then President, Joseph Silvoso, II. After Silvoso stated he had served on the Association, the Committee, and the Board, he testified he was aware of and had read Exhibit A to the CC&Rs, but the Association was not aware of and had never enforced Exhibit A. On cross-examination, the Association's counsel asked Silvoso how the Committee arrived at the 130 feet build-to line. Silvoso replied: "A couple criteria. One was being the . . . Committee went out to the property, looked at what they thought was top of bluff, thought that would be close to 140 feet. And they say you can build to 130. And in looking at his property and trying to give him the maximum build-to line, they looked at the other two sides of the property which would be 1119 and 1107 and [saw] that it would be reasonable that the . . . [C]ommittee, when it was appealed to [B]oard, we thought neither one of those homes would be adversely affected by 130 feet, but

predominantly the [B]oard thought 140 feet was a reasonable top of bluff as determined by the Board and [the] . . . Committee, so they took 10 feet back."

During Matijevich's counsel's cross-examination, Silvoso testified Wardy's proposed home would be the only home built out over the slope. Silvoso said the Committee relied on the Guidelines (Art. 6, § 1, Art. 10, § 4) in determining Wardy's build-to line. When counsel asked him how the Guidelines informed the Committee's decision, Silvoso answered, "[I]n looking at . . . the structures on both sides but also the topography how the bluff and specifically . . . Wardy's property, the arroyo went into -- in towards Dolphin Terrace possibly more so than any of the other lots. The [B]oard, looking at this section when we took that into consideration and the surrounding structures, we felt very comfortable that the guidance that the [Committee] gave of 130 was being very fair to . . . Wardy and the neighbors."

On redirect examination, Silvoso admitted the CC&Rs did not mention the top of bluff rule. When asked why the Committee applied the top of bluff rule, Silvoso explained: "[W]e looked at the . . . [G]uidelines and that was the principle that in addition to the architectural control of Article 6 that monitored what we did when we were out on a property. [¶] We tried to make a determination as to where the top of bluff is because bluff lots in the . . . [G]uidelines were specifically covered in section 11.1 that says you must set back 10 feet. We had -- the only guidance we had to make that determination was visual." Silvoso testified that when he was on the Board, the Committee made a visual inspection of the property and came to an agreement with the property owner as to the location of the top of the bluff.

Wardy also offered David Bray's testimony. Bray stated he was on the five-member Committee in 2004 when Matijevich submitted his building plans, and in 2009 when Wardy submitted his plans. Bray admitted he had never read the CC&Rs "cover to cover," but he did consult the CC&Rs on particular issues. Bray conceded he did not consult the CC&Rs when Matijevich submitted his plans in 2004 or when Wardy

submitted his plans in 2009 because, "We live by the [G]uidelines . . . ." Bray testified that based on Sham's advice, the Committee determined Wardy could build to 130 feet "to try to tie the corners of two neighboring properties . . . ." Bray conceded the Committee did not refer to the CC&Rs or Exhibit A, and the Committee was not aware of Exhibit A until Wardy brought it to the Committee's attention. Bray said the Committee was trying to be "harmonious" with and protect the views of Wardy and his neighbors.

Wardy offered Sham's testimony. Sham testified he had been an architectural consultant for the Association for 30 years. Sham explained he had a copy of the CC&Rs, but he did not review them because "we normally always just review the architectural requirements." Sham added that in all his years advising the Association, he had never been able to obtain the grading plans for the Association from the City. In explaining how the Committee arrived at the 130-foot build to line, Sham stated: "We felt that that lot was basically a landfill and probably the top of the bluff was further back. But we felt that we didn't want to penalize that landowner, so we tried to work out a situation where it would -- if there was a bluff, it would probably make sense where it might have been." Sham did not know if there was ever a bluff on Wardy's lot. On cross-examination, Sham testified Wardy never told him he was aware of Exhibit A to the CC&Rs or that he had a copy of the grading plans or soils report, which would have assisted the Committee in determining the top of bluff and build-to line. Sham stated that had the Committee had the soils report, it likely would have established a build-to line of 120 feet. Sham believed Exhibit A required a build-to line of 123 feet.

Wardy testified on his own behalf. Wardy stated he twice met with the Committee and twice met with the City's planner James Campbell. Wardy admitted he did not submit plans to the Committee and explained he and his architect wanted to first learn what the Committee would permit him to build. Wardy explained he objected to the Committee's 130-foot build-to line because it set his property behind his neighbors' properties.

When Wardy's testimony ended for the day, the trial court and counsel addressed some procedural issues, including the statute of limitations. The trial court stated: "First of all, there are time limits with respect to any action, called the statute of limitations. [¶] . . . [¶] I've heard an offer from [Matijevich's counsel]. That statute has expired with respect to the Matijevich property. I haven't seen any proof yet because he's not in a position to put on his portion of the case. [¶] So I have no way of concluding 'yes' or 'no' with respect to that defense." The court recessed for the day.

The very next morning, Wardy resumed testifying. Wardy stated he suffered monetary damages (interest, property taxes, and utilities) and nonmonetary damages (the Association did not enforce the CC&Rs). Wardy testified that his home was worth the same the time of trial (May 2011) as it was when he purchased it (January 2009), $2.5 million. Wardy's counsel stated he had no further questions for Wardy.

Matijevich's counsel inquired whether Wardy was done with his case-in-chief, and Wardy's counsel replied he was. Matijevich's counsel stated he would reserve his right to question Wardy and intended to make some motions. Wardy's counsel replied, "I just want to object on the record if they are going to make motions before they --" The court said, "At this point, they're basically not -- waiving cross-examination. And so based upon your earlier statement, at this point, I turn to you and ask formally if you have another witness, and your answer is?" Wardy's counsel responded he did not have another witness and he rested. Both the Association and Matijevich moved for judgment pursuant to Code of Civil Procedure section 631.8 (hereafter section 631.8).

The Association's counsel argued, as relevant here, the statute of limitations ran on the breach of fiduciary duty cause of action and the business judgment rule protected the Committee's methodology in determining the top of bluff. Matijevich's counsel argued that with respect to the breach of restrictive covenants cause

of action, Matijevich did not cause Wardy any damages. Additionally, relying on the stipulation concerning when the Association approved his building plans and trial Exhibit 37 (the April 5, 2004, e-mail Livingston sent Bray concerning Jay), counsel said "it's a close call, [and] I'll obviously put more evidence on if I need to[,]" but the five-year statute of limitations had run. (Code Civ. Proc., § 336, subd. (b); Civ. Code, § 784.) Wardy's counsel's responded that with respect to the statute of limitations issue, no one was aware of the violations until 2009 when Wardy had a survey performed. He added it was unlikely Jay had knowledge of Exhibit A to the CC&Rs when not even the Association was aware of Exhibit A's building restrictions and there was no evidence supporting such a conclusion.

The trial court granted judgment in favor of Matijevich. The court, relying on trial Exhibit 37, which the parties stipulated was admissible and was entered into evidence, ruled the five-year statute of limitations on the breach of restrictive covenants cause of action had run. The court explained Jay "was aware and knew or should have known about the construction, clearly did know construction was ongoing." The court ruled that in view of the statute of limitations running, the declaratory relief and injunctive relief causes of action were inapplicable. Wardy's counsel stated, "Your honor, may I be heard?" The court continued with its reasoning and then stated, "[Wardy's counsel] I just heard you say you wanted to be heard? . . . [Y]ou have been heard. [¶] . . . And so I'm not going to invite your comments, because quite frankly, in my experience basically you would be arguing with me. And I don't get paid enough to argue with you. You get paid as they do, to argue with each other." After Wardy's counsel said, "Your honor[,]" the court continued and denied the motion with respect to the Association. When the court paused, Wardy's counsel indicated he had a question as to the admissibility of trial Exhibit No. 37, and the court verified with counsel the parties stipulated as to its admissibility. Wardy's counsel replied, "That explains it, your honor.

That was the question I had." Wardy's counsel did not request an opportunity to offer additional evidence concerning the statute of limitations issue regarding Matijevich.

The trial court then stated he wanted to inspect the site to have a better understanding of the topography. Counsel agreed, and they scheduled the site visit for the following day. The Association's counsel indicated he could have Wardy's property staked to illustrate all the relevant build-to lines. The court indicated he would like to see the Association's 130-foot build-to line, Wardy's proposed build-to line, and the Exhibit A build-to line. The trial court excused the parties for the lunch break. After the lunch break, the trial court discussed with the parties the site inspection. After Matijevich's counsel indicated he arranged to have the property accessible, the court inquired whether Matijevich's counsel would be "staying with us or leaving?" Matijevich's counsel replied he would be leaving, and the court stated it was understandable considering the court's ruling.

The Association offered Wardy's testimony. Wardy agreed the Guidelines prohibit construction on the slope. Wardy admitted he did not read the CC&Rs or the Guidelines, or contact the City, until after he made an offer on the property. He claimed he was not aware of Exhibit A to the CC&Rs until sometime after April 2009, but he was impeached with his deposition testimony where he admitted to being aware of Exhibit A in January 2009. Wardy testified that prior to April 2009, the only thing he submitted to the Committee was his architect's string line diagram. He claimed he did not have a copy of the grading plans before filing his lawsuit. Wardy conceded the Committee offered him a build-to line past the CC&Rs' limit.

The Association offered Campbell's testimony. Campbell, the City's planner, stated he was aware of no facts that would support a variance from the City's zoning code for Wardy's property. And Campbell did not remember telling Wardy he would be grandfathered so the zoning code did not apply to him. On cross-examination, Campbell testified he could have told Wardy he could build a home that lined up with the

predominant line of existing construction. Campbell explained the City would permit Wardy to build a home consistent with the zoning code and he could not make a determination without seeing building plans. The trial court then questioned Campbell. In comparison to the adjacent properties, Campbell stated, "I think the issue with this property is the topography, it kind of comes into the bluff, where the others are a little more straight across." Campbell stated the topography "in this case it harms the property, because if you look at the leading edge of those terraces down the bluff face on the adjacent property, they're a little further out there."

The Association offered the testimony of Olav Meum, a land surveyor, who prepared trial Exhibit 412, a string line exhibit. Exhibit 412 depicts the properties in question, including Wardy's property. Exhibit 412 has four colored lines. The blue line represents the CC&Rs' limits and has a build-to line of 123 feet on the west property line and 115 feet on the east property line. The yellow line represents the Committee's 130-foot build-to line across the west and east property lines. The black line represents Wardy's proposed build-to line of 141 feet on the west property line and 148 feet on the east property line. The red line represents the predominant line of existing development with 143.1 feet on the west property line and 149.4 on the east property line. Meum confirmed the black line represented Wardy's proposed build-to line.

The Association offered the testimony of Charles Lacey, a Committee member. Lacey testified the Committee is governed by the Guidelines. He explained the Committee did not agree with Wardy's proposal because he took "two promontory points along the bluff, [drew] a straight line between the two of them, whereas the actual bluff line receded inward from there." Lacey stated the Committee surveyed the property, the existing bluff line, and the house and looked for ways to help him achieve what he was trying to do, Lacey said the Committee concluded Wardy could build further than the existing house but not as far as Wardy proposed.

After the trial court heard and considered counsels' arguments, it granted judgment in favor of the Association and stated its reasons at length. Wardy requested a statement of decision. The Association's counsel prepared and served on counsel a proposed statement of decision and proposed judgment. Wardy objected to the proposed statement of decision. The trial court adopted the statement of decision and entered judgment in favor of the Association and Matijevich.

In its lengthy statement of decision, the trial court stated it considered the evidence presented at trial as well as a site inspection. The court began by stating it did not believe Wardy should have instituted the action because the Guidelines required him to submit a complete set of building plans to the Committee, which he did not do. The court indicated that from the outset it was clear Wardy wanted to demolish the residence and rebuild, which the Association favored and would have increased property values in the community. The court added the Association determined the build-to line to accommodate Wardy and the Association did not try to avoid this action by asserting Wardy did not submit building plans as it was cost prohibitive to do so.

With respect to the operative provision, the court stated Exhibit A to the CC&Rs applied to only 10 of the hundreds of lots in the Association. The court explained it was clear the Association never enforced Exhibit A against the 10 lots and instead relied on other provisions of the CC&Rs and the Guidelines. The court stated the Association had already approved construction on three properties that violated Exhibit A's restrictions. The court added the Association approved a build-to line for Wardy's property in violation of Exhibit A. The court ruled the Association's approval of construction of 40 percent of the subject lots constituted a waiver of Exhibit A as to all 10 lots. The court reasoned though this did not constitute a waiver of other provisions of the CC&Rs and the Guidelines, including Article VI, section, 1, and Article X, section 4 of the CC&Rs, and section 1.3 of the Guidelines.

The court stated the issue was whether the Association acted reasonably in enforcing the applicable provisions. Citing to *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249 (*Lamden*), the court concluded the Association, without reference to any City codes or plans, acted reasonably. The court indicated it was clear the Association never sought to require Wardy to build in compliance with Exhibit A to the CC&Rs. The court stated the Association based its decision on topography and existing development. The court explained that based on the exhibits, including the grading plan, and the court's site inspection, Wardy's property is unique in that the bluff line curves and meets in the middle of Wardy's property and "reflects an ancient runoff point where water . . . collected . . . underneath where his structure is today." The court said, "Wardy's property is unique because it sits at a point where the bluff turns inward from both sides into his property." The court opined Wardy's development of his property will ultimately be a good thing because water currently flows down the slope, which could impact adjacent properties.

As to Wardy's request his property should line up with adjacent properties, the court reasoned that topography dictates the build-to line because the bluff turns in at Wardy's property. The court characterized Wardy's property as a "topographically disadvantaged lot[]" where "'a river ran through it.'" The court opined the Association was "probably overly generous" with respect to the 130-foot build-to line. The court recognized the Association's build-to line results in a difficult building project, "[b]ut that is what architecture is all about." The court concluded the Association acted reasonably in compliance with the previously stated provisions of the CC&Rs and the Guidelines. The court opined the Association applied the applicable provisions of the CC&Rs and the Guidelines uniformly to the four properties that violated Exhibit A.

With respect to Wardy's breach of restrictive covenants cause of action against Matijevich, the court ruled the action was barred by the five-year statute of limitations. The court stated the previous owner of Wardy's lot, Jay, called an

Association board member in April 2004 expressing concern about Matijevich's construction and thus he knew or should have known facts essential to his cause of action. The court reasoned that for limitations purposes the harm is to the property itself and an owner must file the action within the limitations period or the claim is barred for that and all future owners. The court therefore indicated any claims should have been discovered months before November 5, 2004, and Matijevich's home was open and obvious when Wardy purchased his property. The court entered judgment for the Association and Matijevich. The trial court awarded Matijevich and the Association attorney fees and costs as the prevailing parties pursuant to Code of Civil Procedure section 1354, subdivision (c). Wardy appealed.

DISCUSSION

Matijevich

Wardy argues the trial court erred in entering judgment for Matijevich pursuant to section 631.8 when it ruled the five-year statute of limitations for a breach of restrictive covenants cause of action had run because (1) the court did not comply with section 631.8's procedural requirements, and (2) insufficient evidence supports the court's ruling. Neither contention has merit.

Section 631.8 and Standard of Review

In his opening brief, Wardy asserts the standard of review for a directed verdict is de novo, drawing all fair and reasonable inferences in his favor as we would if we were reviewing a demurrer. Matijevich responds he did not request a directed verdict as this was not a jury trial but instead requested a motion for judgment pursuant to section 631.8 and the standard of review is substantial evidence. In reply, Wardy recognizes the distinction but insists the less deferential standard of review is correct because the court erred in failing to afford him an opportunity to offer additional evidence *after* Matijevich moved for judgment pursuant to section 631.8. We will first discuss section 631.8 and then the proper standard of review.

Section 631.8

Wardy argues the trial court did not comply with section 631.8's procedural requirements because the court did not afford him an opportunity to present additional evidence after Matijevich moved for judgment. As we explain below, Wardy waived that right.

Section 631.8 provides: "(a) After a party has completed his presentation of evidence in a trial by the court, the other party, without waiving his right to offer evidence in support of his defense or in rebuttal in the event the motion is not granted, may move for a judgment. The court as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party, in which case the court shall make a statement of decision as provided in [Code of Civil Procedure] [s]ections 632 and 634, or may decline to render any judgment until the close of all the evidence. *The court may consider all evidence received, provided, however, that the party against whom the motion for judgment has been made shall have had an opportunity to present additional evidence to rebut evidence received during the presentation of evidence deemed by the presenting party to have been adverse to him, and to rehabilitate the testimony of a witness whose credibility has been attacked by the moving party*." (Italics added.)

People v. Mobil Oil Corp. (1983) 143 Cal.App.3d 261 (*Mobil Oil*), is instructive. In that case, the court was faced with the identical issue presented here. (*Id.* at p. 267.) After detailing section 631.8's purpose, the court interpreted the then recent amendments to the statute. The court stated, "[W]e find that the 1978 amendment to section 631.8 is a legislative response to the fact that when a defendant moves for a judgment after the plaintiff has completed his presentation of evidence '. . . the body of evidence before the court often comprises something other than the plaintiff's case pure and unsullied. It may include a heavy mixture of defensive matter . . . .' [Citation.] This 'heavy mixture of defensive matter' may be difficult to disregard when a motion for judgment is under consideration. [¶] The 1978 amendment responds to the problem . . .

by adding to section 631.8 that the court *may* consider all evidence received. The court need not do so. It *permits* the court, in the court's *discretion*, to consider all the evidence which has then been received, including defensive matter, *provided, however*, that the party against whom the motion has been made *shall* have had an opportunity to rebut and to rehabilitate, as specified. . . . [W]e hold that the 1978 amendment requires that when a motion for judgment is made at the close of plaintiff's case, the plaintiff shall have had an opportunity to present additional evidence to rebut and to rehabilitate if, but only if, the court exercises its discretionary power to consider defensive matter in the body of evidence which the court weighs in ruling on the motion." (*Mobil Oil, supra*, 143 Cal.App.3d at p. 271.) The court added however, that plaintiff waived that right because at no time did plaintiff request an opportunity to present additional evidence. (*Ibid*.)

Here, in ruling the statute of limitations had run, the trial court did rely on defense Exhibit No. 37, and thus Wardy could have presented additional evidence to rebut the defense's evidence. Based on our review of the record, however, we conclude Wardy waived the right to present additional evidence. Wardy never made a motion to reopen the trial prior to the granting of Matijevich's motion for judgment. And Wardy made no request to present evidence to rebut or to rehabilitate.

Wardy points to two instances where he claims he attempted to request an opportunity to present additional evidence to rebut the court's finding the statute of limitations began to run in April 2004. He asserts that in both instances the court cut him off. Not so.

In the first instance, the following colloquy occurred: Matijevich's counsel inquired whether Wardy was done with his case-in-chief, and Wardy's counsel replied he was. Matijevich's counsel stated he would reserve his right to question Wardy and intended to make some motions. Wardy's counsel replied, "I just want to object on the record if they are going to make motions before they --" The court said, "At this point, they're basically not -- waiving the cross-examination. And so based upon your earlier

statement, at this point, I turn to you and ask formally if you have another witness, and your answer is?" Wardy's counsel responded he did not have another witness and he rested. Both the Association and Matijevich then moved for judgment pursuant to section 631.8. Although the court interrupted Wardy's counsel, we conclude Wardy's counsel was objecting to defense counsel making motions before they cross-examined Wardy. Wardy's counsel was not requesting an opportunity to present additional evidence to rebut or rehabilitate pursuant to section 631.8 as defense counsel had not yet moved for judgment.

In the second instance, Wardy's counsel inquired whether he could be heard during the trial court's ruling and the court responded Wardy's counsel had been heard. When the court concluded, Wardy's counsel stated he had a question as to the admissibility of trial Exhibit No. 37, and the court verified with counsel the parties stipulated as to its admissibility. Wardy's counsel replied, "That explains it, your honor. That was the question I had." Wardy's counsel was not requesting an opportunity to present additional evidence but only trying to determine whether Exhibit No. 37 was admissible for its truth. Wardy's counsel did not thereafter request an opportunity to present additional evidence. We can hardly fault the trial court for not granting a request that was never legitimately presented.

Thus, because Wardy did not request an opportunity to present additional evidence, he waived that right. We turn now to the applicable standard of review.

Standard of Review

Having rejected Wardy's assertions concerning application of a less deferential standard of review, we now provide the applicable standard of review when reviewing a trial court's ruling on a section 631.8 motion.

"'"The purpose of . . . section 631.8 is 'to enable the court, when it finds at the completion of plaintiff's case that the evidence does not justify requiring the defense to produce evidence, to weigh evidence and make findings of fact.' [Citation.] Under the

statute, a court acting as trier of fact may enter judgment in favor of the defendant if the court concludes that the plaintiff failed to sustain its burden of proof. [Citation.] In making the ruling, the trial court assesses witness credibility and resolves conflicts in the evidence. [Citations.]"' [Citation.] [¶] '"The standard of review of a judgment and its underlying findings entered pursuant to section 631.8 is the same as a judgment granted after a trial in which evidence was produced by both sides. In other words, the findings supporting such a judgment 'are entitled to the same respect on appeal as are any other findings of a trial court, and are not erroneous if supported by substantial evidence.'"' [Citations.] '"[W]hen the decisive facts are undisputed, [however,] the reviewing court is confronted with a question of law and is not bound by the findings of the trial court. [Citation.] In other words, the appellate court is not bound by a trial court's interpretation of the law based on undisputed facts, but rather is free to draw its own conclusion of law."' [Citations.]" (*Plaza Home Mortgage, Inc. v. North American Title Co., Inc.* (2010) 184 Cal.App.4th 130, 135.) Because Wardy concedes there is substantial dispute concerning the evidence on the statute of limitations issue, we review the court's ruling for substantial evidence.

Statute of Limitations

Wardy contends there was insufficient evidence the five-year statute of limitations for a cause of action for breach of restrictive covenant had run, the statute of limitations was tolled, and the court erroneously excluded evidence rebutting that the statute of limitations had run.[2] None of his contentions have merit.

The statute of limitations for breach of restrictive covenant cause of action is five years. (Code Civ. Proc., § 336, subd. (b); Civ. Code, § 784.) Code of

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[2] We note Wardy does not address the statute of limitations of his causes of action for declaratory relief and mandatory injunctive relief (Code Civ. Proc., § 337(1) [four years]), presumably because they are less than five years.

Civil Procedure section 336, subdivision (b), adds, "The period prescribed in this subdivision runs from the time the person seeking to enforce the restriction discovered or, through the exercise of reasonable diligence, should have discovered the violation."

Sufficiency of the Evidence

Wardy asserts there was insufficient evidence the statute had run on his breach of restrictive covenants cause of action for the following reasons: (1) he claims trial Exhibit No. 37 lacked foundation and contained hearsay; (2) there was a substantial conflict in the evidence regarding when the statute of limitations began to run; and (3) the Association did not give final approval to build until after November 2004. We need not address these claims because Wardy stipulated to the dispositive fact: The Association approved Matijevich's building plans in September 2004.

The parties stipulated "[the Association] approved . . . Matijevich's building plans on September 15, 2004." The parties' stipulation established Matijevich was authorized to begin construction and Jay should have discovered the violation of Exhibit A to the CC&Rs. (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 142; *Greatorex v. Board of Administration* (1979) 91 Cal.App.3d 54, 58 [stipulation binding agreement between parties and is substitute for proof by evidence and truth of facts contained therein cannot be contradicted].) Indeed, based on his correspondence on the issue beginning in April 2004, Jay should have discovered the violation through the exercise of reasonable diligence. On September 16, 2004, Jay clearly had the right to seek an injunction preventing Matijevich from building because the Association had approved his building plans. Thus, the statute of limitations on the breach of restrictive covenant cause of action began to run September 15, 2004, and it ran five years from that date, which was seven weeks before Wardy filed his complaint.

Tolling

Wardy next asserts the statute of limitations was tolled while Matijevich participated in alternative dispute resolution. Wardy cites to the Davis-Stirling Act's

alternative dispute resolution process (Civ. Code, § 1369.550), and principles of equitable tolling. With respect to Davis-Stirling's dispute resolution process, there was no evidence Matijevich participated. Indeed, the parties stipulated Wardy participated in the CC&Rs internal dispute resolution process and Wardy and the Association complied with Davis-Stirling's alternative dispute resolution process.

As to equitable tolling, it stops the statute of limitations from expiring when a plaintiff has remedies in addition to state court. Equitable tolling has three elements: timely notice; lack of prejudice to defendant; and good faith conduct on part of plaintiff. (*Structural Steel Fabricators, Inc. v. City of Orange* (1995) 40 Cal.App.4th 459, 464-465.) Wardy cites to an exhibit, Exhibit No. 15, which he claims would demonstrate he sent Matijevich notice. But the court apparently did not admit that exhibit into evidence, and thus, it is not before us. Additionally, as we explain above, Wardy did not move to reopen the case for him to present additional evidence on the statute of limitations.

Exclusion of Evidence

Finally, Wardy complains the trial court erred in excluding evidence that would have demonstrated the statute of limitations did not run. First, in violation of the California Rules of Court, Wardy does not provide record references to some of the evidence he complains was erroneously excluded. (Cal. Rules of Court, rule 8.204 (a)(1)(c).) Second, as we explain above, Wardy stipulated one of the pieces of evidence, Exhibit No. 54, was admissible for a limited purpose. Finally, although Wardy's counsel may have tried to question Lacey concerning when Matijevich began building his house, and Silvoso regarding how the City code applies to the Association, Wardy never moved to reopen the trial. In conclusion, the trial court properly ruled the five-year statute of limitations had run on Wardy's breach of restrictive covenants cause of action against Matijevich.

The Association

Wardy argues: (1) the trial court erred in concluding the Association waived enforcement of Exhibit A to the CC&Rs; (2) the court erred in concluding the Association's 130-foot build-to line was protected by the judicial deference rule/business judgment rule (hereafter judicial deference rule); and (3) the court committed various other errors. We will address each in turn.

Waiver

Wardy contends the trial court erred in concluding the Association waived enforcement of Exhibit A. We disagree.

"'By statute, any instrument "affecting the title to . . . real property may be recorded" by the "county recorder of the county in which the real property affected thereby is situated." [Citations.] . . . Civil Code section 1213 provides that every "conveyance" of real property recorded as prescribed by law provides "constructive notice" of its contents to subsequent purchasers. The term "conveyance" is broadly defined to include "*every instrument* in writing . . . by which the title to any real property *may be affected* . . . ." [Citations.]'" (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1373 (*Alfaro*); 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 325 [proper recordation imparts constructive notice of contents of instrument which is equivalent of actual knowledge, i.e., knowledge contents conclusively presumed]; 5 Miller & Starr, Cal. Real Estate (3d ed. 2009) § 11:60, p. 152 [subsequent party has constructive notice of document and contents, including all rights and restrictions, upon proper recordation].)

"The right to enforce a restrictive covenant may be deemed generally waived when there are 'a sufficient number of waivers so that the purpose of the general plan is undermined,' in other words, when 'substantially all of the landowners have acquiesced in a violation so as to indicate an abandonment. [Citation.]" (*Alfaro, supra,* 171 Cal.App.4th at p. 1380.) We review the trial court's ruling de novo. (*Ekstrom v.*

Marquesa at Monarch Beach Homeowners Assn. (2008) 168 Cal.App.4th 1111, 1121 (*Ekstrom*).)

Here, we conclude the Association waived enforcement of Exhibit A to the CC&Rs. The CC&Rs were recorded in September 1970. Not only is Exhibit A part of the CC&Rs, Exhibit A begins on the last page of the CC&Rs, just after the signature block. It strains credulity anyone could read the CC&Rs and not be aware of Exhibit A.

The Association includes 384 properties, approximately 100 of which have ocean views. Exhibit A governs only 10 of those properties. The evidence established the Association never enforced Exhibit A against any of the 10 lots. Indeed, it was undisputed the Association approved building plans for three property owners who built structures in violation of Exhibit A. Matijevich's, Bogner's and Lunsford's homes were all in violation of Exhibit A's build-to line. Additionally, the Association approved a build-to line for Wardy that violated Exhibit A. Thus, the evidence at trial established the Association waived Exhibit A as to 40 percent of the properties. Thus, based on the record before us, we conclude this was a sufficient number of waivers so that the purpose of Exhibit A is undermined.

Judicial Deference Rule

Wardy claims insufficient evidence supports the trial court's finding the Association's decision was protected by the judicial deference rule. Not so.

In *Lamden, supra*, 21 Cal.4th 249, the California Supreme Court adopted for California courts a "rule of judicial deference to community association board decisionmaking" that applies when owners in common interest developments seek to litigate maintenance or repair decisions entrusted to the discretion of their associations' boards of directors. (*Id.* at pp. 253, 265.) In *Lamden*, the owner of a unit in a condominium development sued the development's community association for injunctive and declaratory relief, claiming the association's board of directors diminished the value of her unit by deciding to "spot-treat" rather than fumigate her unit to treat a termite

infestation. (*Id.* at pp. 253, 254-256.) Upholding the trial court's judgment in favor of the association, the California Supreme Court held: "[W]here a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise." (*Id.* at p. 252.) Applying this rule to the case before it, the *Lamden* court concluded the trial court properly deferred to the board's decision to spot-treat the termite infestation rather than fumigate the plaintiff's unit. (*Id.* at pp. 264-265.)

Under the applicable *Lamden* rule of judicial deference, courts should defer to the authority and presumed expertise of a duly constituted community association board when the board, in discharging an obligation to maintain or repair the development's common areas, makes a discretionary decision that is: (1) within the scope of its authority under relevant statutes, covenants, and restrictions; (2) based upon a reasonable investigation; (3) made in good faith; and (4) made with regard for the best interests of the community association and its members. (*Lamden, supra,* 21 Cal.4th at p. 265.) Applying the *Lamden* rule of judicial deference, we conclude that substantial evidence supports the judgment, and thus the court properly deferred to the Association's discretion in this matter. To the extent the issues raised in this appeal involve the trial court's resolution of disputed facts or inferences, we apply the substantial evidence standard of review. (*Rancho Santa Fe Assn. v. Dolan-King* (2004) 115 Cal.App.4th 28, 43.) We will now turn to the four elements of the judicial defense rule.

First, although the *Lamden* court was confronted with a maintenance issue, we do not construe the rule of judicial deference to be limited only to an association's discretionary decisions concerning maintenance or repair issues. The relevant inquiry under the first prong is whether the Association's decision is within the scope of its

authority under the relevant statutes, covenants, and restrictions. The CC&Rs charge the Committee with approving all building plans to ensure the proposed structure is harmonious with the surrounding structures and topography. (CC&Rs, Art. VI, § 1, Art. X, § 4; Guidelines, § 1.3.) Additionally, for bluff lots, the Committee must ensure the structure is 10 feet back from the top of the slope. (Guidelines, § 13.1.) Thus, it is within the scope of the Committee's and the Association's authority to ascertain and approve the build-to line for all properties within the Association. (CC&Rs, Art. VI, §1.)

Second, in determining the build-to line for each of the affected properties, there was evidence from which the trier of fact could reasonably conclude the Committee made a reasonable investigation to determine the build-to line. As we explain above, there was evidence the Committee was not aware of Exhibit A to the CC&Rs and did not have the grading plans for the area. Like the Committee had done with the other three properties that violated Exhibit A, the Committee visited Wardy's property in an effort to come to an agreement with the property owner the location of the top of the bluff. The Committee went to Wardy's property and made a visual inspection of the property to determine where the top of the bluff was located. The Committee considered the topography and the adjacent structures to determine the build-to line of 130 feet (top of bluff 140 feet minus 10 foot setback per CC&Rs & Guidelines).

Third, although it is conceded the Association did not enforce Exhibit A to the CC&Rs against Matijevich, Lunsford, and Bogner, it is also undisputed the Association never intended to enforce Exhibit A against Wardy and made a good faith effort to determine a build-to line for his property, taking into account the topography of his property and consistent with prior practice. The evidence established the Committee used the same methodology to determine the top of the bluff as to all the affected properties. The Committee did not treat Wardy differently than it treated Matijevich, Lunsford, and Bogner. Instead, it accommodated Wardy by not requiring him to submit building plans, saving him the expense of preparing plans for a home that ultimately he

may not be able to build. All the evidence established the Committee wanted to give Wardy the maximum build-to line it could but it was limited by the Guidelines, topography, and adjacent homes. In fact, Sham testified Wardy's lot was a landfill and the top of bluff was likely further back, but the Committee did not want to penalize Wardy and wanted to help him accomplish what he was trying to do. Finally, and most telling, the evidence demonstrated that had the Association enforced Exhibit A against Wardy, his build-to line would have been 123 feet on the west property line and 115 feet on the east property line, instead of 130 feet across.

Finally, there was evidence from which the trier of fact could certainly conclude the Committee made its decision with regard for the best interests of the community association and its members. The evidence at trial established the Committee agreed upon a 130 feet build-to line to assist Wardy in accomplishing what he wanted to do without adversely affecting his neighbors. The Committee made its determination in accordance with the CC&Rs (Article VI, § 1 [harmony of external design and location in relation to surrounding structures and topography]), and the Guidelines (§ 1.3 [Committee base judgment on character of structure or landscape with respect to harmony of exterior design and location in relation to surrounding structures and topography of the Association as a whole]).

Wardy relies on another case from this court, *Ekstrom, supra*, 168 Cal.App.4th 1111, to argue that because the Committee's interpretation of the CC&Rs was inconsistent with the CC&Rs, the judicial deference rule is inapplicable. In *Ekstrom*, a group of homeowners sued their homeowners association, individual members of its board of directors, and its property management company. (*Id.* at pp. 1113, 1118.) Plaintiffs contended the association violated the CC&Rs by refusing to enforce, as to palm trees, a provision requiring that *all* trees obstructing views be trimmed, topped, or removed. (*Id.* at p. 1121.) This court affirmed the judgment in favor of the homeowners compelling the association to enforce the CC&Rs as to palm trees, rejecting the

association's assertion the judicial deference rule protected its decision. The court opined: "Even if the Board was acting in good faith and in the best interests of the community as a whole, its policy of excepting all palm trees from the application of section 7.18 was not in accord with the CC&Rs, which require all trees be trimmed so as to not obscure views. The Board's interpretation of the CC&Rs was inconsistent with the plain meaning of the document and thus not entitled to judicial deference. [Citation.]" (*Id.* at p. 1123.)

Ekstrom is inapposite. In that case, the association interpreted the CC&Rs inconsistent with their plain meaning. Here, the Association was not aware of Exhibit A to the CC&Rs and did not interpret Exhibit A inconsistent with its plain meaning. Although the methodology the Committee used resulted in three properties (four including Wardy's property) in violation of Exhibit A, there was sufficient evidence supporting the court's determination the Association reasonably investigated and in good faith exercised its discretion within the scope of its authority to select a fair and harmonious build-to line on Wardy's property. Thus, based on the record before us, we conclude there was sufficient evidence to support the court's ruling it should defer to the Association's decision.

Miscellaneous Claims

Wardy makes several more arguments, none of which are persuasive.

First, Wardy contends the top of bluff rule is inapplicable to his property because it does not remedy his neighbors' violations, it cannot be applied to only 10 lots, and it is arbitrary and inconsistent. As we explain above, the Association waived enforcement of Exhibit A to the CC&Rs, and the evidence established the Association never intended to enforce Exhibit A against Wardy. Eventually all 10 lots may be in violation of Exhibit A. The evidence demonstrated the Committee did not have a copy of the grading plans and developed an alternate, admittedly less precise, method to

determine the top of bluff in consultation with the property owner. As we explain above, the evidence at trial established we should defer to the Association in its determination.

Second, Wardy complains the court failed to provide any explanation and rulings on the principal controverted issues at trial. In its statement of decision, the court stated Exhibit A to the CC&Rs applies to 10 lots and the Association never enforced Exhibit A. Although the court found the Association had a duty to enforce Exhibit A, and it breached that duty, the court ultimately ruled the affirmative defense was dispositive. There was nothing left for the court to say.

Third, Wardy grouses the trial court relied on personal experience in making its ruling. Wardy did not object to the trial court visiting his property, so long as it was after his case-in-chief. We agree the court provided extraneous information about buildability and drainage, but this does not alter our finding sufficient evidence supports the court's ruling on the judicial deference rule.

Finally, Wardy asserts, without providing any citation to the record, the court erred in forbidding him from testifying concerning the expected value of his property. Wardy testified his home was worth the same the time of trial as it was when he purchased it, $2.5 million. Wardy failed to provide any reasoned analysis how he was prejudiced, and we will not consider his claim. (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 522-523 (*McComber*).)

Attorney Fees and Costs

Citing to Civil Code section 1354, Wardy argues the trial court erred in awarding Matijevich and the Association attorney fees and costs because liability was established and essentially he was the prevailing party. Because we affirm the judgment, Wardy was not the prevailing party, and we reject his contention. Wardy also complains the Association's attorney fees and costs were unreasonable and excessive. Wardy cites to nothing in the record to support his claim, and thus it is waived. (*McComber, supra,* 72 Cal.App.4th at pp. 522-523.)

Attorney Fees on Appeal

As Matijevich points out a party who successfully defends an award of attorney fees is entitled to appellate attorney fees as well. (*Sebago, Inc. v. City of Alameda* (1989) 211 Cal.App.3d 1372, 1388.) Wardy does not challenge that assertion.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs and attorney fees on appeal.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

IKOLA, J.